

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

JANELLE KRANZ,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-04-054
	:	<u>OPINION</u>
- vs -	:	5/26/2009
	:	
SCOTT KRANZ,	:	
Defendant-Appellant.	:	

APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 06DR30268

Janelle Kranz, 858 Cherokee Drive, Mason, Ohio 45040, plaintiff-appellee, pro se

John D. Smith, Suite B, 140 North Main Street, Springboro, Ohio 45066, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Scott Kranz, appeals from the decision of Warren County Court of Common Pleas, Domestic Relations Division, regarding his spousal and child support obligations, custody matters, and its classification of credit card debt as marital property, following his divorce from plaintiff-appellee, Janelle Kranz, as well as its decision denying his motion for a new trial. We affirm the decisions of the trial court.

{¶2} Scott Kranz ("Husband") and Janelle Kranz ("Wife") were married on May

15, 1994. The couple has two children, Connor, born August 20, 1999, and Cooper, born May 16, 2001. Wife filed for divorce on June 13, 2006, and a two-day contested hearing was held on October 2 and 3, 2007. The trial court, in its October 8, 2007 decision, classified and divided the property, ordered Husband to pay Wife child and spousal support, and designated Wife as residential parent and legal custodian of the parties' minor children. Husband then moved for a new trial, which the trial court denied.

{¶13} Husband now appeals the trial court's decisions, raising seven assignments of error. For ease of discussion, Husband's assignments of error will be addressed out of order.

{¶14} At the outset, it should be noted that a trial court's decisions in domestic relations matters are generally reviewed under an abuse of discretion standard. *Zornes v. Zornes*, Clermont App. No. CA2005-05-042, 2006-Ohio-877, ¶12, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 143. A trial court does not abuse its discretion unless its decision is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. "Since it is axiomatic that a trial court must have discretion to do what is equitable upon the facts and circumstances of each case, it necessarily follows that a trial court's decision in domestic relations matters should not be disturbed on appeal unless the decision involves more than an error of judgment." *Gamble v. Gamble*, Butler App. No. CA2006-10-265, 2008-Ohio-1015, ¶3; *Booth* at 144.

{¶15} Assignment of Error No. 1:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND IN CALCULATING HIS GROSS INCOME FOR CHILD AND SPOUSAL SUPPORT PURPOSES AT \$197,000."

{¶17} In his first argument, Husband claims the trial court erred and abused its discretion when it used his 2007 income for purposes of establishing his child and

spousal support obligations "because a three-year average was more appropriate." Specifically, Husband claims the trial court should have averaged his income "[d]ue to the fluctuating nature" of Equity Remodel, Inc., a successful home remodeling company doing business throughout the Louisville and Cincinnati area, of which he is a 55 percent owner. In support of this argument, appellant calls our attention to R.C. 3119.05(H), which permits the trial court, "when appropriate," to average the obligor's income over a reasonable period of years in order to compute "gross income" for a child support order.¹

{¶8} Income averaging, pursuant to R.C. 3119.05(H), may be appropriate when the obligor's income is unpredictable or inconsistent. *Rhoades v. Priddy-Rhoades*, Franklin App. No. 06AP-740, 2007-Ohio-2243, ¶11. However, the decision to average the obligor's income is left to the trial court's sound discretion because it is in the best position to weigh the facts and circumstances of each case. *In re Sullivan*, 167 Ohio App.3d 458, 2006-Ohio-3206, ¶29; *Fisher v. Fisher*, Henry App. No. 7-05-03, 2005-Ohio-5615, ¶20 (stating "the trial court may average income over a reasonable number of years; however, it is not required to do so"). In turn, the trial court's decision not to engage in income averaging, such as the case here, will not be reversed absent an abuse of discretion. *Scott G.F. v. Nancy W.S.*, Huron App. No. H-04-015, 2005-Ohio-2750, ¶46-47; *Wright v. Wright*, Cuyahoga App. No. 91026, 2009-Ohio-128, ¶24.

{¶9} Although Husband's annual income from his business venture, Equity Remodel, may certainly be unpredictable or inconsistent, such uncertainty is due, at least in part, to Husband's own actions given his control over the company's distributions

1. Our research has not uncovered any analogous statutory language dealing with "income averaging" as it relates to spousal support awards. See, generally, R.C. 3105.18.

as majority owner.² In addition, and as noted above, the trial court may average the obligor's income, but it is not required to do so. See *Fisher* at ¶20. As a result, and although we may agree Husband's income can be inconsistent, we find the trial court did not err, or abuse its discretion, in its decision to use Husband's 2007 income instead of averaging his income over a reasonable period of years in order to establish his child and spousal support obligations. See, e.g., *In re Sullivan* at ¶29-31; *Fisher* at ¶20-21. Therefore, Husband's first argument lacks merit.

{¶10} Husband next argues the trial court erred "by including \$107,000 in distributions" he received from Equity Remodel when calculating his 2007 gross income because he provided uncontroverted evidence that "some of the distributions were loans from his business that required repayment and some of them had already been included in Husband's 2006 income."

{¶11} While it may be true that Wife presented no evidence to contradict Husband's testimony regarding the characterization of the distributions from Equity Remodel, "evidence tending to prove a fact does not necessarily become uncontroverted or uncontested simply because an opposing party does not present rebuttal evidence." *Collins v. Collins* (Oct. 15, 2001), Clinton App. No. CA2000-09-023, at 5. In fact, even where the opposing party does not present evidence to rebut the proffered evidence, the trier of fact is still not required to accept such evidence as credible. *Id.*, citing *GTE North, Inc. v. Carr* (1993), 84 Ohio App.3d 776, 780, fn. 3. Instead, it is the role of the trier of fact to weigh the testimony and credibility of witnesses, and to resolve any disputes of fact. *Collins*, citing *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 23.

2. Specifically, Husband testified that "if there's money for us to take, you know, as income[,] we take it," and that "[w]e just take it whenever we need it[,] and [when] there's an opportunity to take it."

{¶12} In this case, Husband testified that he receives \$90,000 in salary from Equity Remodel, and that he had already received \$107,000 in distributions from his company in 2007, the same year in which the two-day hearing was held, thus bringing his total 2007 income to \$197,000. Husband also testified that he, from time to time, had to "reimburse the distribution back to the company," and that it would be unfair to allocate these distribution payments as dividend income. However, the trial court, after weighing the facts and circumstances of the case, determined Husband's gross income should include the \$107,000 in distributions from his business because he provided "no documentation to corroborate [his] allegations including claims of repayment of distributions." As a result, because it is the trial court's role to weigh the testimony and credibility of the witnesses, we find the trial court did not err, or abuse its discretion, by including the \$107,000 in distributions received from Equity Remodel when calculating Husband's gross income for purposes of computing his support obligations. Therefore, Husband's second argument lacks merit. Accordingly, Husband's first assignment of error is overruled.

{¶13} Assignment of Error No. 3:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND IN NAMING WIFE RESIDENTIAL PARENT AND LEGAL CUSTODIAN WHERE THE EVIDENCE ESTABLISHED SUCH WAS NOT IN THE BEST INTERESTS OF THE MINOR CHILDREN."

{¶15} Husband argues the trial court erred by designating Wife as residential parent and legal custodian of Connor and Cooper, the parties' minor children. We disagree.

{¶16} A trial court is required to allocate parental rights and responsibilities for minor children pursuant to R.C. 3109.04. *Cross v. Cross*, Preble App. No. CA2008-07-

015, 2009-Ohio-1309, ¶9. In turn, the trial court must follow the procedure outlined in R.C. 3109.04 in making the initial custody designation. *Haynes v. Haynes*, Clermont App. No. CA2008-01-003, 2008-Ohio-4963, ¶31; *Gehring v. Gehring*, Warren App. No. CA2003-03-038, 2004-Ohio-95, ¶7. In making this initial determination, the best interest of the children remains the trial court's primary concern. *Gamble*, 2008-Ohio-1015 at ¶25. When analyzing what is in the best interest of the children, the trial court must consider all relevant factors, including but not limited to, the factors specified in R.C. 3109.04(F)(1). *Gehring* at ¶7.

{¶17} The trial court has broad discretion in designating parental rights and responsibilities, so that the trial court's initial custody decision should not be reversed absent an abuse of that discretion. *Cross* at ¶8; *Haynes* at ¶30; *Gamble* at ¶3, citing *Booth*, 44 Ohio St.3d at 144. As this court has previously observed:

{¶18} "The discretion which a trial court enjoys in custody matters should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *Gamble* at ¶29, quoting *Pater v. Pater* (1992), 63 Ohio St.3d 393, 396.

{¶19} Husband, in support of his claim that Wife is not fit to be either residential parent or legal custodian, argues the trial court's "custody determination was an abuse of discretion given the voluminous evidence of Wife's indiscretions, drug and alcohol problems, and continuous lies." However, while there was testimony presented indicating Wife's troubled past,³ including her battle with alcohol and drugs, which

3. Husband also alleged Wife has involved in "Internet solicitation," and that she frequented a number of websites in order to pursue "a wealthy, older man to give her money and expensive gifts in exchange for

ultimately led to her arrest and conviction for forging prescriptions, there was also testimony describing her ongoing treatment and continued success in rehabilitation, something that has caused her to "change immensely." In fact, the trial court heard testimony indicating Wife was the primary caretaker for the children prior to her time in rehabilitation, and that the children have spent a significant amount of time bonding with her extended family. In addition, Husband even admitted during his direct examination, although with some hesitation, that Wife has become a "supermom," and that the children are "happy when they're with her * * *."

{¶20} The trial court, in its decision designating Wife as residential parent and legal custodian, found the "children clearly love both parents, * * * [and] seem to be doing well." Nonetheless, after considering all the evidence presented and adjudging the credibility of the witnesses, the trial court determined naming Wife as residential parent and legal custodian was "clearly" in the best interest of the children. In view of the evidence before the trial court, we cannot say that the trial court's decision to name Wife as residential parent and legal custodian constituted an abuse of discretion. Therefore, Husband's third assignment of error is overruled.

{¶21} Assignment of Error No. 5:

{¶22} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND BY CONCLUDING THAT WIFE'S CREDIT CARD DEBT WAS MARITAL AND TO BE DIVIDED EQUALLY BETWEEN THE PARTIES."

{¶23} Husband claims the trial court erred by finding Wife's "personal credit card debt" was marital debt since he was unaware that she had the disputed credit cards, and because at least one of the incurred charges was for nonmarital purposes. This

sex." In support of this claim, Husband produced computer printouts of several adult oriented dating websites containing her picture. Husband was unable to provide any other evidence at trial that she had, in

argument lacks merit.

{¶24} A trial court's *allocation* of marital debt will not be reversed absent an abuse of discretion. *Vaughn v. Vaughn*, Warren App. No. CA2007-02-021, 2007-Ohio-6569, ¶41, citing *Elliott v. Elliot*, Ross App. No. 05CA2823, 2005-Ohio-5405, ¶17. However, a trial court's *classification* of debt as marital or separate is reviewed under the manifest weight of the evidence standard. *Nicholas-Ross v. Ross*, Butler App. No. CA2008-03-090, 2009-Ohio-1723, ¶23. In addition, debts accumulated during the marriage are presumed to be marital debts. *Id.* at ¶26, citing *Nemeth v. Nemeth*, Geauga App. No. 2007-G-2791, 2007-Ohio-3263, ¶50. When debt is accumulated during the marriage, the burden is on the party seeking to have that debt classified as a separate liability to demonstrate, by a preponderance of the evidence, that such debt was the separate obligation of the other spouse. *Nicholas-Ross* at ¶26, citing *Brady v. Brady*, Portage App. No. 2007-P-0059, 2008-Ohio-1657, ¶38.

{¶25} After reviewing the record, it is clear that the disputed credit card debt was incurred during the marriage. Furthermore, although Husband claims the credit card debt includes, among other things, charges stemming from adult oriented websites his wife used to conduct "Internet solicitation," Husband has provided no evidence, besides his mere speculation and vague allegations, that any of the charges were for purposes unrelated to the marriage. As the trial court found, neither party provided any evidence that the charges incurred on the disputed credit cards were for any "separate purposes."

Therefore, even though the credit card contained Wife's name only, we find no error with the trial court's decision. As a result, we find the trial court did not err, or abuse its discretion, in classifying the disputed credit card debt as marital debt. Accordingly,

fact, engaged in sexual relations for money. In response, Wife adamantly denied these allegations, and any involvement with the purported websites.

Husband's fifth assignment of error is overruled.

{¶26} Assignment of Error No. 7:

{¶27} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND BY FINDING HIM IN CONTEMPT OF COURT FOR VIOLATING THE MUTUAL RESTRAINING ORDER."

{¶28} Husband argues the trial court erred by finding him in contempt for interfering with Wife's prospective employment at Western Row Elementary in the Mason City School District. In support of this argument, Husband claims the trial court abused its discretion because he had a "right" to inform Mason City School Officials of his Wife's alleged "illicit activities." We disagree.

{¶29} Contempt of court is defined as "disobedience of an order of a court * * * which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Hueber v. Hueber*, Clermont App. Nos. CA2006-01-004, CA2006-02-019, CA2006-02-020, 2007-Ohio-913, ¶16, citing *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus. To support a contempt finding, the moving party must establish, by clear and convincing evidence, the existence of a valid court order, that the offending party had knowledge of the order, and that the offending party violated such order. *Hueber* at ¶16, citing *Arthur Young & Co. v. Kelly* (1990), 68 Ohio App.3d 287, 295; *Davis v. Davis*, Clark App. No. 06-CA-17, 2007-Ohio-322. An appellate court, in reviewing a decision concerning a finding of contempt, will not reverse such a finding absent an abuse of discretion. *Edwards v. Edwards*, Warren App. No. CA2006-04-044, 2007-Ohio-123, ¶8; *Willis v. Willis*, 149 Ohio App.3d 50, 66, 2002-Ohio-3716, ¶59.

{¶30} It is undisputed that there was a mutual restraining order in place that prohibited either party from "interfering with the other party or the parties' children." At

trial, there was testimony presented indicating Husband, after learning that his wife applied for a position as a part-time cafeteria aide at Western Row Elementary, contacted Mason City School Officials and held a meeting where he informed them of her alleged inappropriate behavior, which included her prior drug conviction, and purported "Internet solicitation." In addition, there was also testimony from Tom Morris, the Director of Student Services with Mason City Schools, indicating Wife was not hired because of this meeting, and that she would be working at the school if not for Husband's actions. The trial court, in its decision holding Husband in contempt, determined that "it was his clear intent to interfere with [his wife's] employment," and that he violated the mutual restraining order by informing school officials of her alleged inappropriate behavior. We find no error in the trial court's decision. As a result, the trial court did not abuse its discretion by holding Husband in contempt for violating the mutual restraining order. Therefore, Husband's seventh assignment of error is overruled.

{¶31} Husband's remaining assignments of error, all dealing with the trial court's decision denying his motion for a new trial, will be addressed together.

{¶32} Assignment of Error No. 2:

{¶33} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND BY DENYING HUSBAND'S MOTION FOR NEW TRIAL ON THE ISSUE OF GROSS INCOME."

{¶34} Assignment of Error No. 4:

{¶35} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND BY DENYING HUSBAND'S MOTION FOR NEW TRIAL ON THE ISSUE OF CUSTODY."

{¶36} Assignment of Error No. 6:

{¶37} "THE TRIAL COURT ERRED TO THE PREJUDICE OF HUSBAND BY DENYING HUSBAND'S MOTION FOR NEW TRIAL ON THE ISSUE OF ALLOCATION

OF DEBT."

{¶38} Pursuant to Civ.R. 59(A), the trial court may grant new trial for, among other things, "good cause shown," or upon a showing of "misconduct of * * * the prevailing party." The decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Hover v. O'Hara*, Warren App. No. CA2006-06-077, 2007-Ohio-3614, ¶71, citing *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 1995-Ohio-224.

{¶39} Initially, Husband argues the trial court erred in its decision denying his motion for a new trial because he now has evidence, namely, an affidavit from his accountant, Jeffrey Stewart, indicating the \$107,000 in distributions he received from Equity Remodel were, in fact, loans that required repayment. In turn, Husband, although not explicit in his argument, essentially claims the trial court erred in denying his motion for a new trial on the issue of income because of this "newly discovered" evidence.

{¶40} While the trial court may grant a new trial based on "[n]ewly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial," Husband provided no explanation to the trial court, or to this court, as to why this evidence was not produced at trial. Civ.R. 59(A)(8); *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410-411. In fact, the trial court, in its decision denying Husband's motion for a new trial regarding the issue of income, explicitly stated that "[t]here [was] no reason that Husband's CPA could not have testified at trial." We find no error in the trial court's decision. Therefore, we conclude that the trial court did not abuse its discretion when it declined to grant Husband's motion for a new trial on the issue of income.

{¶41} Next, Husband also claims he now has "sufficient evidence to prove Wife *

* * blatantly lied during trial," thus tainting the trial court's decision regarding its child custody award, as well as its classification of the disputed credit card charges as marital debt. However, just as noted above, Husband presented no evidence to the trial court, or to this court, as to why this information was not originally presented at trial. In addition, although this evidence may call into question Wife's credibility, Husband did not present any evidence, beyond his speculation and bare assertions, that the trial court's decision was explicitly based upon his wife's alleged false testimony. Therefore, we conclude that the trial court did not abuse its discretion when it declined to grant Husband's motion for a new trial on the issue of custody or the classification of debt. Accordingly, Husband's second, fourth, and sixth assignments of error are overruled.

Judgment affirmed.

POWELL and RINGLAND, JJ., concur.